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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1951

No. 595

JOHN W. WOOLLEY,
Petitioner,

vs.

STATE OF MICHIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN AND BRIEF IN SUPPORT OF PETITION

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SUMMARY STATEMENT OF MATTER INVOLVED

The petitioner herein, John W. Woolley, is a citizen of the United States and a resident of the State of Michigan, residing in the City of Battle Creek, Calhoun County, Michigan. On July 7, 1950, petitioner was arraigned before Hon. Ward I. Waller, Circuit Judge of the County of Cheboygan on an information charging that defendant was guilty of the crime of "attempt to procure the commission of an act of gross indecency, with another male person under the age of fifteen years, to-wit: one Ronald Lee Causey, of the age of thirteen years," to which charge defendant entered a plea of not guilty. A copy of the information is hereto annexed and marked Exhibit I. Petitioner was tried upon said information in the said Circuit Court and convicted by Circuit Judge Arthur Wilcox, acting without a jury, said judge presiding by assignment, and was sentenced by said court to be and remain confined in the State Prison of Southern Michigan, at Jackson, for a period of not less than three nor more than five years from and including the day of sentence May 17, 1951. Petitioner is now at liberty on bond pending the determination this application for writ of certiorari, cash collateral being deposited with the Clerk of the Circuit Court of Cheboygan County, in the amount of $5,000.00.

Notwithstanding the basic questions involved in this proceeding involving deprivation of petitioner's Constitutional rights, the Supreme Court of the State of Michigan refused to grant leave to appeal and on motion for rehearing, affirmed its previous order denying leave to appeal without reasons being given therefor. Copies of said order are attached hereto and marked Exhibits III and IV.

Petitioner charges that his conviction was illegal and contrary to the Fourteenth Amendment to the Constitution of the United States for the following reasons:

(1) For the reason that there was not a *scintilla* of evidence before the lower court upon which a conviction for an "attempt" could be sustained in the lower court, of the alleged crime.

(2) That the conviction of petitioner without any evidence supporting the conviction of the crime of which defendant was charged is a denial of due process under the

Fourteenth Amendment to the Constitution of the United States.

(3) That the conviction of the defendant under the circumstances of this case deprives petitioner of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States in that the sole testimony relating to the commission of the attempt with which petitioner is charged was, (to state the case most favorably to the prosecution) that the petitioner asked the prosecuting witness to go fishing; that they departed in petitioner's automobile; and after stopping in the town of Wolverine for certain errands, left for fishing; that petitioner asked the complaining witness if he wanted to drive the car; the record shows beyond peradventure that the petitioner did not attempt to solicit by *words* or *any other statement* to procure the prosecuting witness to commit an act of gross indeceny, the sole testimony going to the effect that it is claimed that petitioner unbuttoned the trousers of prosecuting witness, and put his hand in and touched the private parts of the prosecuting witness, a boy of thirteen years, for a period of time until the automobile got stuck in certain sand.

The prosecuting witness, who was the sole witness to the alleged crime, affirmatively testified to facts which are so entirely inconsistent with the claim of an *attempt to procure* the commission of an act of gross indecency as to be completely and entirely inconsistent therewith. The crux of the testimony appears in the cross-examination of the defendant by the Court as follows:

"THE COURT: Now did he attempt to prevent you from leaving the car?

THE WITNESS: No.

THE COURT: *Now, what did he say to you about doing an immoral act with him? You know what I mean, don't you?*

THE WITNESS: *He didn't say anything.* I don't recall.

THE COURT: Nothing about that. You understand what I mean?

THE WITNESS: Yes.

THE COURT: *He did perform these actions?*

THE WITNESS: *Yes.*

THE COURT: *With his hands, but he didn't say anything?*
THE WITNESS: No, sir."

Petitioner further shows that there was *no* competent evidence before the Court upon which a finding could be made that petitioner was guilty of an attempt to procure the commission of an act of gross indecency, (which failed, for some reason).

(4) That the conviction denied petitioner of his liberty without due process of law for the reason that the statute petitioner is claimed to have violated sets up such a vague and indefinite standard that men of common intelligence are required to guess at its meaning, and did not give adequate guidance to those who would be law abiding and did not advise the defendant of the nature of the offense with which he was charged, and could not guide the Court in trying one accused of its violation. The said statute reads as follows:

> Sec. 28.570 *Michigan Statutes Annotated,* Sec. 338. "Any male person who, in public or private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a felony, punishable by imprisonment in the state prison for not more than five (5) years or by a fine of not more than two thousand five hundred (2,500) dollars."

(5) Petitioner further shows that under the decisions of all of the courts in this country that when the *only evidence in the record* is of a *completed offense* (*if any* — the petitioner herein denying that the facts even show the completion of an immoral act) that no conviction can be had for an *attempt.* See *People vs. Rivers,* 147 Mich. 643 at 644; and *People vs. Partridge,* 86 Mich. 242 at page 244 and 245; see also *People vs. Lardner,* (Ill.) 19 *A.L.R.* at page 723 to the effect that evidence that a crime has been committed will not sustain a verdict for an attempt to commit it, the essential element of *interception* or *prevention of execution* being lacking.

THIS COURT HAS JURISDICTION

This is an appeal by certiorari to review the final judgment and determination of the court below, the Michigan Supreme Court having refused to grant leave to appeal without reason being given, on October 3, 1951, and the motion for rehearing was denied also without reason on December 7, 1951. Substantial Federal questions were raised in the Supreme Court below; this Court has jurisdiction under Title 28, Sec. 344, and 350; U.S.C.A. Sec. 237 of the Judicial Code, as amended, and Rule 38 of the Rules of the Supreme Court of the United States.

THE QUESTIONS PRESENTED

(1) There was not a scintilla of evidence before the lower upon which a conviction of an *attempt* could be sustained in the lower court.

(2) The conviction of defendant without any evidence to support such a conviction is a denial of due process under the Fourteenth Amendment of the Constitution of the United States.

(3) The conviction of the defendant under the circumstances deprives defendant of his liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

(1) Substantial Federal questions are presented with respect to the scope of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

(2) Petitioner has been denied due process of law as set forth in the Fourteenth Amendment. He has not had a fair trial or a fair review of this case in the Supreme Court of the State of Michigan. He is entitled to the protection of the amendment.

Copies of the information and sentence are attached hereto; and marked Exhibits I and II.

Respectfully submitted,

ROGER H. NIELSEN,
Attorney for Petitioner.

Business Address:
126 Capital Avenue, N. E.,
Battle Creek, Michigan.

EXHIBIT I

INFORMATION

STATE OF MICHIGAN
THE CIRCUIT COURT FOR THE COUNTY OF CHEBOYGAN

CHEBOYGAN,) ss.

John A. Cain, Prosecuting Attorney in and for the County of Cheboygan aforesaid, for and in behalf of the People of the State of Michigan, comes into said Court, in the July term thereof, in the year 1950, and gives the Court here to understand and be informed that One, John W. Woolley, a male person heretofore, to-wit: on the 29th day of May, 1950, at the Township of Wilmot in the County of Cheboygan aforesaid, did then and there in a motor vehicle, to-wit: Lincoln Sedan bearing Michigan license number JD 11-98 upon a county road in the said Township of Wilmot, attempt to procure the commission of an act of gross indecency with another male person under the age of fifteen years, to-wit: one, Ronald Lee Causey of the age of thirteen years.

Contrary to the form of the Statute 28.570 in such case made and provided, and against the peace and dignity of the People of the State of Michigan.

(s) John A. Cain,
Prosecuting Attorney in and
for the said County.

EXHIBIT II

PROCEEDINGS ON SENTENCE

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF CHEBOYGAN

People of the State
of Michigan,
Plaintiff,
vs.
John W. Woolley,
Defendant.

"Thursday, May 17, 1951 — 10:35 A. M.

"MR. CAIN: If it please the Court, at this time, in the matter of The People of the State of Michigan vs. John W. Woolley, I'd like to call Mr. Woolley for sentence.

THE COURT: Are you ready, Mr. McGinn?

MR. McGINN: Yes. (To Respondent) Come up, Mr. Woolley.

THE RESPONDENT: Yes.

(Respondent came forward with counsel).

THE COURT: Well, Mr. Woolley, you were convicted by the Court last week — I think on Wednesday of last week; I think it was the 9th — of the offense of an attempt to commit or committing indecent conduct with another male person.

The Court has found it unnecessary to have a private interview with you, feeling nothing could be gained thereby, although I have talked privately with your attorney and to one of your friends. But the Court, feeling that such an investigation as was considered necessary, into all the facts of the case, having been made and reported,

and the Court, being, I think, fully advised in the premises, is now ready to pronounce its judgment; and you are asked if at this time you have anything to say why the sentence of the Court should not be pronounced upon you.

MR. McGINN: Do you wish to say anything to the Court?

THE RESPONDENT: No, sir.

THE COURT: Very well.

As I stated to another man who was just up for sentencing on the same offense, or practically the same offense, I consider a lecture under these circumstances of little value. It would just add to your humiliation, if that is possible, and would accomplish no good.

It is a strange and a sort of a nasty and horrid offense to an ordinary normal person, but you yourself will realize that perhaps better than anyone else. You, at least, are a very intelligent, capable man. That's all I have to say, except that the sentence of the Court is that you be and remain confined in the State Prison of Southern Michigan at Jackson for a period of not less than three nor more than five years from and including this day; no recommendation being made at this time by the Court.

That is all."

EXHIBIT III

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room in the Capitol, in the City of Lansing, on the third day of October, in the year of our Lord one thousand nine hundred and fifty-one.

Present the Honorable

NEIL E. REID,
Chief Justice
EMERSON R. BOYLES,
WALTER H. NORTH,
JOHN R. DETHMERS,
HENRY M. BUTZEL,
LELAND W. CARR,
GEORGE E. BUSHNELL,
EDWARD M. SHARPE,
Associate Justices.

The People of the State of Michigan,
Plaintiff,
vs. **45294½**
John W. Woolley,
Defendant.

In this cause an application is filed by defendant for leave to appeal from the sentence of the Circuit Court for the County of Cheboygan, and a brief in opposition thereto having been filed by plaintiff and due consideration thereof having been had by the Court, It is ordered that the application be and the same is hereby DENIED.

STATE OF MICHIGAN—ss.

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Supreme Court at Lansing, this 4th day of October, in the year of our Lord one thousand nine hundred and fifty-one.

Jay Mertz,
Clerk.

By (s) Hugh H. Carpenter,
Deputy Clerk.

EXHIBIT IV

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fourth day of December in the year of our Lord one thousand nine hundred and fifty-one.

Present the Honorable

NEIL E. REID,
Chief Justice,
EMERSON R. BOYLES,
WALTER H. NORTH,
JOHN R. DETHMERS,
HENRY M. BUTZEL,
LELAND W. CARR,
GEORGE E. BUSHNELL,
EDWARD M. SHARPE,
Associate Justices.

The People of the State
of Michigan,
Plaintiff,
vs. 45294½

John W. Woolley,
Defendant.

In this cause a motion is filed by defendant for a reconsideration of the order heretofore entered herein on Octo-

ber 3, 1951, denying defendant's application for leave to appeal, and a brief in opposition thereto having been filed by plaintiff, and due consideration thereof having been had by the Court, It is ordered that the order heretofore entered herein on October 3, 1951, as aforesaid, stand affirmed.

STATE OF MICHIGAN—ss.

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 6th day of December, in the year of our Lord one thousand nine hundred and fifty-one.

Jay Mertz,
Clerk.

By (s) Hugh H. Carpenter,
Deputy Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. .....

JOHN W. WOOLLEY,
Petitioner,

vs.

STATE OF MICHIGAN,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The jurisdiction of this Court, a recital of the contents of the opinions below and the statement of facts have been fully set forth in the Petition for Writ of Certiorari.

POINTS RELIED UPON

I.

Under the requirement of due process of law contained in the Constitution of the United States, petitioner could not be convicted legally when there was no evidence to support a conviction of the crime of which the Defendant was charged and a conviction of the Defendant without any evidence to support the conviction is a denial of due process under the Fourteenth Amendment to the Constitution of the United States.

II.

The conviction of petitioner deprived petitioner of his liberty without due process of law for the reasons that the

Statute petitioner is claimed to have violated sets up such a vague and indefinite standard that men of common intelligence are required to guess at its meaning, that the Statute did not give adequate guidance to those who would be law abiding and did not advise the Defendant of the nature of the offense with which he was charged, and that such a statute could not guide the Court in trying one accused of its violation.

III.

The conviction deprived petitioner of his liberty without due process of law for the reason that the only evidence in the record is of a completed offense (if any), petitioner herein denying that the facts even show the completion of an immoral act, so that no conviction could be had for an attempt.

SCOPE OF ARGUMENT

Due process of law includes the right to introduce evidence and have judicial findings *based upon evidence. Baltimore & Ohio Railroad Co. vs. United States,* 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797.

I.

Conviction of the Defendant without any Evidence supporting the Conviction of the Crime with which Defendant was charged is a Denial of Due Process under the Fourteenth Amendment of the Constitution of the United States.

The right under the Fourteenth Amendment to have a finding based upon evidence cannot mean anything but that the finding must be based upon competent evidence, so that a finding of guilt where there is no evidence to support it constitutes a denial of the petitioner's right of due process.

In *Ex parte Jones,* 96 Fed. 200 (C. C., N. D. Ala.), decided in 1899, there was a prosecution for sending scurrilous matter through the mails, the testimony at arraignment showing that such matter was sent but not who sent it. A writ of habeas corpus was sued out after the peti-

tioner was bound over for trial and the Court, after stating that it would not inquire into the sufficiency of the evidence presented to the Commissioner, went on to say:

> "But the Court may inquire whether the commissioner had any competent or legal evidence before him on which to exercise his judgment as to the criminality of the accused. (Citing Church on Habeas Corpus (2nd Ed.) Section 231.) If it appears from the evidence before the committing magistrate, not only that no probable cause was shown, but that there was no legal evidence before him tending to incriminate the petitioner, she should be discharged on habeas corpus."

In *Baltimore & Ohio Railroad Co. vs. United States,* supra, it is pointed out:

> "The due process clause assures a full hearing before the Court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence *and have judicial findings based upon it.*" (Emphasis added).

In 12 Am. Jur., "Constitutional Law," page 313, Section 620, it is pointed out:

> "The case against the party asserting the protection of the due process guaranty *must be made out by proof,* in the absence of a default."

The foregoing principle has been recognized by the Michigan Supreme Court in earlier cases. For example, in *People vs. Smith,* 260 Mich. 486, it was pointed out:

> "Conviction by a jury without evidence commands no procedural support, and when the error is fundamental, manifest, and noticed, such a conviction cannot be permitted to stand."

It was also pointed out in *People vs. Wayonan,* 247 Mich. 308, at Page 311:

> "A jury may draw reasonable inferences from facts established, either by direct or circumstantial

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evidence, but may not indulge in inferences wholly unsupported by any evidence."

The Michigan Court quoted the two above excerpts with approval in *People vs. Collins,* 292 Mich. 217, and went on to observe:

> "When the case was submitted to the jury, defendant's proof of inability stood uncontradicted as to this essential element of the charge and, since there is no evidence on this point to support the verdict of the jury, it must be vacated and defendant discharged from custody."

It was pointed out by the District Court of the United States in *U. S. ex rel. Fongon vs. McCarthy,* 228 Fed. 398 in a decision by Judge Learned Hand that such a question can be reviewed upon *habeas corpus* where there is no other review, citing *Hyde vs. Shine,* 199 U. S. 62, at page 84, 25 S. Ct. 760, 50 L. Ed. 90, and *Greene vs. Henkel,* 183 U. S. 249, at 261, 22 S. Ct. 218, 46 L. Ed. 177.

To state the matter in another way, unless the actions which the petitioner has been proved to have participated in constitute the crime with which he was charged and convicted, then his conviction should be reviewed and set aside. With this factor in mind, we submit that the conviction was entirely improper and erroneous.

The law covering the question on intent to commit a crime shows that *first* there must be an intent to commit the crime and *secondly* a direct *ineffectual* act done towards its commission. If all that is shown is the completion of everything which the petitioner intended to do, there cannot be "an ineffectual act". This rule is enforced not only in Michigan but appears to have been adopted by all courts before whom the question has arisen. The rule is stated in 8 *R. C. L., "Criminal Law,"* Section 294, Page 277, as follows:

> "It will be observed that a failure to consummate the crime is as much an element of an attempt to commit it as the intent and the performance of an overt act towards its commission. *Hence, when a crime is actually consummated there can be no prosecution for an attempt."*

The rule is similarly stated in 14 *Am. Jur.* "*Criminal Law,*" Section 65, Page 813, as follows:

> "An attempt to commit a crime is any overt act done with the intent to commit the crime and which, except for the interference of some cause preventing the carrying out of the intent, would have resulted in the commission of the crime. An indictable attempt, therefore, consists of two important elements: (1) An intent to commit the crime, and (2) a direct ineffectual act done towards its commission. Mere intention to commit a specified crime does not amount to an attempt; nor does preparation alone constitute an attempt. It must also be observed that a failure to consummate the crime is as much an element of an attempt to commit it as the intent and the performance of an overt act towards its commission. *Hence, when a crime is completely consummated, there can be no prosecution for an attempt.*" (Emphasis added).

An examination of the record in the case at bar, shows that there is not a scintilla of evidence to show any intent on the part of Mr. Woolley to do anything further or other than, at most, the act of disorderly conduct which, it is testified, he engaged in. However, even if the acts which he did constituted the *crime* as distinguished from an *attempt thereat,* this would not be evidence which would sustain a conviction based upon an *attempt.* The case of *People vs. Lardner* (Ill.) 19 A.L.R., page 723, states the rule clearly. There it is pointed out:

> "Evidence that a crime has been committed will not sustain a verdict for an attempt to commit it, because the essential element of interception or prevention of execution is lacking. Graham v. People, 181 Ill. 477, 47 L.R.A. 731, 55 N.E. 179; People v. Purcell, 269 Ill. 467, 109 N.E. 1007; United States v. Quincy, 6 Pet. 464, 8 L. Ed. 465; 1 Wharton, Crim. Law Par. 173; 16 C.J. 113. When an indictment charges an offense which includes within it a lesser offense, the defendant, though acquitted of the higher offense, may be convicted of the lesser; but that rule cannot be applied to an attempt defined by the statute, *because an essential element of the attempt is a failure to consummate*

the crime. The statute only includes a case where there is a direct, ineffectual act toward the commission of crime. *If the evidence for the people proved the* defendant guilty of the crime of larceny, he could not *be convicted for an attempt which failed.*" Emphasis added).

The prosecuting witness testified as follows (Record, Page 20):

"THE COURT: Now, did he attempt to prevent you from leaving the car?

"THE WITNESS: No.

• • •

(Record, Page 21)

"THE COURT: What did he say to you then about getting back in the car?

"THE WITNESS: He was trying to coax me in the car, and then he said, 'what will your aunt think?' I told him I didn't care what my aunt thought.

"THE COURT: You say you were frightened?

"THE WITNESS: Yes.

"THE COURT: Now what did he say to you about doing an immoral act with him. You know what I mean, don't you?

"THE WITNESS: He didn't say anything; I don't recall.

"THE COURT: Nothing about that. You understand what I mean?

"THE WITNESS: Yes.

"THE COURT: He just performed these actions?

"THE WITNESS: Yes.

"THE COURT: With his hands, but he didn't say anything?

"THE WITNESS: No, sir."

There is no evidence that the accused made any solicitation to go further into the transaction than was testified to as being completely accomplished.

No attempt was made to prevent the boy from leaving the car. He made no remarks other than what the boy testified to on direct examination that "what would his aunt think?"

What the boy assumes might have happened is not evidence, of course; there is no testimony of any intention to do anything more than was actually accomplished. This patently is not the crime charged (See statute in Petition).

If the evidence which the people proved showed that the Defendant was guilty of the crime of *committing an act of gross indecency,* he could not be convicted of an *attempt* which failed.

An examination of the case law in the State of Michigan shows that while the question has not arisen a great many times, that in those cases where the question has come before the Michigan Supreme Court, it has adopted a similar view, namely, that where the only testimony in the record is of the completed offense, that this evidence is entirely inconsistent with a charge of an attempt without committing or intending to commit the higher degree of crime. In other words, if the testimony of the prosecution is true, the crime committed was an act of gross indecency, — if that was not true, then there was no crime committed. The following Michigan cases are illustrative:

People vs. Rivers, 147 Mich. 643, at 644:

> "Respondent was convicted of, and sentenced to State prison for, *feloniously assualting and taking indecent liberties with the person of Flora Peer,* his stepdaughter, a child under the age of 14 years, *without committing or intending to commit the crime of rape.* The information contained two counts; the first charging rape, the second charging felonious assault and taking indecent liberties.
>
> "*The only testimony as to the offense was given by Flora Peer, who testified as to the details of a completed act of sexual intercourse,* although with slight penetration of her person.
>
> "Respondent's counsel contend that the evidence is inconsistent with the charge of which he was convicted, and *that he is entitled to his discharge. We are constrained to hold that this contention is correct. People v. Partridge,* 86 Mich. 243." (Emphasis added).

People vs. Partridge, 86 Mich. 243, at pages 244 and 245:

"The respondent was tried in the Alpena Circuit Court upon an information containing two counts.

"The first count charged him with unlawfully and carnally knowing and abusing a female child under the age of 14 years, and of the age of 13 years, on the 3d day of July, 1890, at the city of Alpena.

"The second count was added under the statute, and averred that the respondent, on the same day and year, and at the same place, feloniously assaulted the female child, and did then and there take indecent and improper liberties with her person, *without then and there committing or intending to commit the crime of rape* upon her. See Act. No. 153, Laws of 1887.

"The defendant was convicted and sentenced upon the second count. • • •

"The verdict cannot stand. *The respondent, by this verdict, was acquitted of the charge in the first count, and there was not a scintilla of evidence to support the second count. If the testimony of the prosecution was true, the crime committed was rape under the statute. If it was not true, then there was no crime committed.* There was nothing tending to show that any indecent or improper liberties were taken with the girl without the intent of committing rape. Under the testimony the respondent was guilty of rape, or not guilty of any offense. The court should have instructed the jury that there could be no conviction under the second count.

"As respondent was acquitted on the first count, and should have been acquitted on the second count, the judgment of the court below must be reversed, and the respondent discharged. The jury have found him not guilty of carnally knowing the girl. They found him guilty of an entirely different offense, of the commission of which there was absolutely no evidence in the case. *It is our duty, no matter how much we may deplore the result, to discharge him.*" (Emphasis added).

It should further be noted that the conviction of an *attempt* constitutes an acquittal of the more serious crime — *committing an act* of gross indecency. In 8 R. C. L., "Criminal Law", Sec. 131, Page 146, it is pointed out:

> "Where a person is brought to trial and jeopardy has attached he cannot be tried thereafter for a greater offense arising out of the same criminal act, unless the first conviction was procured by the fraud, connivance, or collusion of the defendant. Thus a person who is brought to trial on a charge of assault and battery cannot be tried thereafter on a charge of assault with intent to commit some other crime; and it has been held that a verdict of assault and battery on an indictment for stabbing is a bar to another indictment for stabbing, as on an indictment for the greater offense the verdict may be for the lesser. Likewise as an assault is an absolutely necessary element in, and essential to, the crime of assault with intent to commit a rape, when a man has been tried for the offense of assault he may interpose the plea of former jeopardy as a complete defense to a subsequent indictment for the crime of assault with intent to commit rape, where such indictment is founded on the same act. And where a person has been convicted of arson he cannot afterwards be tried on an indictment for murder resulting from the commission of the same arson, where the statute imposes the penalties of murder, for such arson. And again where a person is convicted of larceny, he cannot thereafter be tried for robbery of which the larceny in the former charge was an essential element."

The following cases are also illustrative:

Graham vs. People of the State of Illinois, 181, Ill. 477, 47 L.R.A. 731. at page 735 —

> "It will be observed that a failure to consummate the crime is as much an element of an attempt to commit it as the intent and the performance of an overt act towards its commission. In *United States vs. Quincy*, 6 Pet. 464, 8 L. Ed. 465, the Supreme Court of the United States says: 'To attempt to do an act does not, either in law or in common parlance, imply a com-

pletion of the act, or any definite progress towards it.' *Wharton*, in his work on *Criminal Law*, (vol. 1, Par. 173) says: 'An attempt is an intended apparent unfinished crime. * * * It must be unfinished, as otherwise the indictment would be for the complete crime.' * * *

"Inasmuch as our statute clearly defines the offense of an attempt to obtain money by means of the confidence game as being different and distinct from the offense of obtaining money by means of the confidence game, some force must be given to the provisions of the statute. It would appear to be logical that, when a man is indicted for a particular offense, he must be proved guilty of that offense, and not of some other. It seems to follow that, if a man can be indicted for an attempt to commit an offense, and, under such indictment, be proved to have been guilty of the consummated offense, it would be unnecessary to make the latter a distinct crime. If proof that a man obtained money by means of the confidence game is proper under an indictment against him for an attempt to obtain money by means of the confidence game, then it would seem to be unnecessary in any case to indict him for the offense of obtaining money by means of the confidence game."

Commonwealth of Pennsylvania vs. Johnson, 89 A.L.R. 333, at 337 —

"* * * Certainly the situation is well within our definition of an attempt as stated in Com. v. Crow, 303 Pa. 91, 98, 154 A. 283, 285:

'An attempt is an overt act done in pursuance of an intent to do a specific thing, but falling short of completion, Com. v. Eagan, 190 Pa. 10, 42 A. 374; or as defined in 8 R.C.L. 277; 'An indictable attempt therefore consists of two important elements: first, an intent to commit the crime; and, second, a direct ineffectual act done towards its commission. It will be observed that a failure to consummate the crime is as much an element of an attempt to commit it as the intent and the performance of an overt act towards its commission.'"

II.

The Statute Petitioner is Claimed to have Violated is so Indefinite that it Violates the Requirement of Due Process of Law.

Petitioner was charged, convicted and sentenced under the following statute:

Michigan Penal Code, Sec. 338, *M.S.A.* Sec. 28.570, *Mich. Comp. Laws* of 1948, Sec. 750.338 —

> "Any male person who, in public or in private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a felony, punishable by imprisonment in the state prison for not more than five years or by a fine of not more than two thousand five hundred dollars."

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essentials of due process of law. See *International Harvester Co. vs. Kentucky,* 234 U. S. 216 at page 221, 58 L. Ed. 1284 at 1287, 34 S. Ct. 853; *Collins vs. Kentucky,* 234 U. S. 634, 58 L. Ed. 1510 at page 1511; *Lanzetta vs. New Jersey,* 306 U. S. 451, 83 L. Ed. 888.

It was pointed out in *Connally vs. General Construction Co.,* 269 U. S. 385, 70 L. Ed. at page 329:

> "The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing

a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

In the Annotation to *Lanzetta vs. New Jersey,* 306 U. S. 451, 83 L. Ed. 888 at 898:

> "A statute which makes it a misdemeanor to commit any act injurious to the public health or public morals, or to the perversion or obstruction of public justice or the due administration of the laws, is void for vagueness and uncertainty because it makes criminality depend upon the moral idiosyncrasies of the individuals who compose the court and jury. Ex parte Andrew Jackson, 45 Ark. 158. The court said 'The standard of crime would be ever varying, and the courts would constantly be appealed to as the instruments of moral reform, changing with all fluctuations of moral sentiment. The law is simply null. The Constitution, which forbids ex post facto laws, could not tolerate a law which would make an act a crime, or not, according to the moral sentiment which might happen to prevail with the judge and jury after the act had been committed."

The Supreme Court of Michigan in *People vs. Carey,* 217 Mich., 601, *held that no particular definition is required in this statute,* saying:

> "The indelicacy of the subject forbids it, and does not require of the court to state what particular conduct will constitute the offense. The common sense of the community, as well as the sense of decency, propriety, and morality which most people entertain, is sufficient to apply the statute to each particular case, and point out what particular conduct is rendered criminal by it."

It must be conceded that the Michigan Supreme Court did not have the concept of due process of law in mind at the time it made this opinion.

The Michigan Supreme Court in that case held that it was not necessary to describe the particular act charged, stating:

"The gross indecency of the subject forbids it."

It is submitted that it is just as grossly indecent to try a man under an indictment and statute which do not inform him of the act charged and penalized as to perform those acts shuddered at by the court.

CONCLUSION

The record in this case, viewed in the light of the cases cited above, clearly shows that petitioner was deprived of his liberty without due process of law and in disregard of his rights. First, the statute under which he was convicted is drawn in such vague terms as to be an absolute nullity. Second, the evidence introduced at the trial definitely shows that there was no "ineffectual act." Yet, disregarding the constitutional issues squarely presented, leave to appeal was denied by the Michigan Supreme Court. If certiorari is not granted in such a case, the private citizen has no protection whatsoever against the most flagrant slighting of his constitutional rights, although the furnishing of such protection is at least *one* of the main duties of our appellate courts.

RELIEF SOUGHT

The Writ of Certiorari should issue.

Respectfully submitted,

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Dated January 31, 1952.

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